

1 BEFORE THE
2 POLLUTION CONTROL HEARINGS BOARD
 STATE OF WASHINGTON

3 IN THE MATTER OF)
4 LEON S. SAVARIA,)
)
5 Appellant,)
)
6 v.)
)
7 STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)
)
8 Respondent.)
)

PCHB No. 78-53

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

9
10 This matter, the appeal of an order requiring head gates and
11 measuring devices at points where water is diverted, having come on
12 regularly for formal hearing on the 8th day of December, 1978 in
13 Spokane, Washington, and appellant Leon S. Savaria appearing pro se,
14 and respondent Washington State Department of Ecology appearing
15 through Laura E. Eckert, Assistant Attorney General, with William A.
16 Harrison, hearing examiner presiding, and the Board having considered
17 the exhibits, records and files herein and having reviewed the Proposed
18 Decision of the presiding officer mailed to the parties on the 14th

1 day of December, 1978, and more than twenty days having elapsed from
2 said service; and


3 The Board having received no exceptions to said Proposed Decision
4 and the Board being fully advised in the premises; now therefore,

5 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said Proposed
6 Decision containing Findings of Fact, Conclusions of Law and Order
7 dated the 14th day of December, 1978, and incorporated by reference
8 herein and attached hereto as Exhibit A, are adopted and hereby entered
9 as the Board's Final Findings of Fact, Conclusions of Law and Order
10 herein.

11 DONE at Lacey, Washington, this 1st day of February,
12 1979.

13 POLLUTION CONTROL HEARINGS BOARD

14 
15 DAVE J. MOONEY, Chairman

16 
17 CHRIS SMITH, Member

18 
19 DAVID A. AKANA, Member

20
21
22
23
24
25
26
27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 Witnesses were sworn and testified. Exhibits were examined. From
2 testimony heard and exhibits examined, the Pollution Control Hearings
3 Board makes these

4 FINDINGS OF FACT

5 I

6 Wenas Creek is a small stream which flows from the eastern
7 slope of the Cascades to join the Yakima River at Selah, Washington.

8 In 1921, Wenas Creek was adjudicated in a proceeding before the
9 Superior Court for Yakima County, brought under RCW 90.03.110-.240 of
10 the State Water Code of 1917. The Court's decree adjudicated the extent
11 and priority of rights to withdraw water from Wenas Creek. (Hereafter,
12 "1921 adjudication decree".)

13 II

14 The appellant, Savaria, acquired over 1,200 acres of farmland
15 in the Wenas Valley in December, 1976. There are rights to divert water
16 from Wenas Creek which are appurtenant to this land. From the date of
17 the adjudication decree in 1921 until just after appellant acquired the
18 subject land, respondent, Department of Ecology (DOE), did not require
19 that measuring devices be placed at points of withdrawal. Such measuring
20 devices would have aided in enforcement of the 1921 adjudication decree,
21 the terms of which have been widely ignored.

22 III

23 In June, 1977, one Robert S. Nesland, and others holding water
24 rights on Wenas Creek, commenced an action against the DOE in the
25 Superior Court for Yakima County, No. 77-2-00625-7, seeking that DOE
26 be ordered to enforce the 1921 adjudication decree. A stipulated order

27 FINDINGS OF FACT,

CONCLUSIONS OF LAW AND ORDER

1 was presented by Nesland and DOE which provided that DOE shall enforce
2 the 1921 adjudication decree and, further, that DOE shall

3 Require all water users of the Wenas Creek and its
4 tributaries to have in working condition by March 15, 1978,
5 headboxes and measuring devices in accordance with state
6 statutes and applicable rules and regulations of state
7 agencies. The Department of Ecology or its successor, if
8 any, shall take appropriate legal action against water users
9 who do not have headboxes and measuring devices.

10 This stipulation was duly entered as an Order of the Superior Court for
11 Yakima County on June 27, 1977.

12 IV

13 In October, 1977, DOE issued a form order to some 300 persons
14 holding water rights on Wenas Creek. The order stated, in pertinent part:

15 . . . that (name of person holding a water right) shall
16 have in working condition by March 15, 1978, headboxes and/
17 or measuring devices, as approved by the Department of
18 Ecology, for each of his diversions of waters of Wenas Creek,
19 its branches, tributaries, sumps, ponds, reservoirs,
20 infiltration structures (well or trench), springs, or other
21 water sources that are derived from or contribute to the
22 water of Wenas Creek. [Per p. 2 of Exhibit R-7.]

23 An attached cover letter indicated government agencies which would help
24 with design and financing of the required devices.

25 Of the 300 recipients of the Order, some 255 are not interested in
26 withdrawing water from Wenas Creek, leaving 45 persons who are. Of
27 these, 27 have installed the required devices, while 18, including
28 appellant, have not.

29 V

30 A form Order as described above, Docket No. DE 77-741, was mailed to
31 appellant at 845 S.W. 170th, Beaverton, Oregon, in October, 1977. At
32 that time, this address was not the appellant's home or place of

33 FINDINGS OF FACT,
34 CONCLUSIONS OF LAW AND ORDER

1 business and he did not receive that order. Nevertheless, appellant
2 received one of the DOE form orders with text identical to DE 77-741, in
3 March, 1978. From this appellant appeals.

4 Appellant does not challenge the authority of the 1977 Order of
5 the Superior Court for Yakima County requiring DOE to require headboxes
6 and measuring devices by March 15, 1978. Neither does he oppose the
7 installation of equipment, per se. Rather, he requests an extension of
8 the time for installation until the summer of 1979 citing cost and
9 difficulty of finding a capable contractor.

10 VI

11 Any Conclusion of Law which should be deemed a Finding of Fact
12 is hereby adopted as such.

13 From these Findings, the Pollution Control Hearings Board comes
14 to these

15 CONCLUSIONS OF LAW

16 I

17 Because appellant received no order of the kind appealed from until
18 March, 1978, his appeal, filed March 15, 1978, is timely. RCW 43.21B.120.

19 II

20 While ordinarily DOE may have discretion regarding the date by which
21 headboxes and measuring devices must be installed, RCW 90.03.360, the
22 1977 Order of the Superior Court for Yakima County leaves DOE no
23 choice on the facts of this case. That 1977 Order requires installation
24 by March 15, 1978, and the appealed DOE Order issued to appellant must,
25 and does, follow that mandate. DOE's Order must therefore be affirmed.

26 FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER

III

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Board enters this

ORDER

The motion of the Department of Ecology to dismiss this appeal as untimely is hereby denied.

The Department of Ecology Order that appellant shall:

. . . have in working condition by March 15, 1978, head-boxes and/or measuring devices, as approved by the Department of Ecology, for each of his diversions of waters of Wenas Creek, its branches, tributaries, sumps, ponds, reservoirs, infiltration structures (well or trench), springs, or other water sources that are derived from or contribute to the water of Wenas Creek.

is hereby affirmed.

DONE at Lacey, Washington, this 14TH day of December, 1978.

POLLUTION CONTROL HEARINGS BOARD

William A. Harrison
WILLIAM A. HARRISON
Presiding Officer

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER